

Not everyone

Maximilian Steinbeis

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Ferdinand von Schirach, the German lawyer and best-selling author and playwright, has published a new European human rights declaration for our time. It includes five new human rights: to a healthy environment, to digital self-determination, to protection from algorithms and fake news, to a supply chain free of human rights violations, all of them enforceable before the European Court of Justice. “Everyone” is supposed to have these rights, “Everyone” (*Jeder Mensch*) is the title of the [booklet published this week by Luchterhand](#), and the story Schirach tells in it goes like this: The human rights declarations of the American and French revolutions in the 18th century were utopian at the time and first had to be fought for, by the Marquis de Lafayette for example, the general on Washington’s side in the American War of Independence, who later drafted the *Déclaration des Droits de l’Homme et du Citoyen* for the French National Assembly. A century later, when American and French troops were fighting the Germans in World War I, a US colonel stepped up to Lafayette’s grave in Paris, saluted and said, “Lafayette, we are here”.

Schirach suggests something allegedly parallel to his readers: They should follow the lead of the authors of the American Declaration of Independence and the French Declaration of Human Rights by scanning a QR code or going to a website and to signal their support for his declaration: New Human Rights – like! It’s a “long, complicated and expensive process” that Schirach is preparing his smartphone-equipped supporters for, but in the end, he promises, “you will leave generations to come with something joyful, something radiant. And one day you will be able to say, “Lafayette, we are here.””

Sounds great. But before I embark on this long, complicated and expensive process, I have a few questions.

Human rights as opposed to what? The American and French revolutionaries were up against absolutist monarchs and the defenders of a class stratified social order that provided the contrast for the freedom among equals they postulated. Where is this contrast in the current situation? Every authoritarian populist worth his salt now uses the vocabulary of democracy, freedom, equality and dignity no less fluently than any of his liberal opponents, which is precisely what makes the situation so dangerous and confusing, and the temptation to turn to days of yore for orientation so great. Those who call for emulating American and French revolutionaries dead for 200 years must take care not to produce nostalgic kitsch. That’s not just an aesthetic problem. Unlike in the 18th century, it is no longer “the human being” abstractly and as opposed to throne, nobility and clergy, but specific “human beings” to whom things which are or should be unlawful are being inflicted in specific political and contemporary constellations. Who exactly is being wronged, and by whom?

Schirach’s text speaks in the first person plural. “We” are facing new challenges, “we” are exposed to unimagined dangers, “we, the citizens of the European

Union" take these new rights for self-evident. We, the People: that is the agenda. A European demos is to be constituted here, a "we" making itself the subject of postulated rights. A *bürgerlich* European "we" is constructed that speaks in the name of "everyone", but is recognisably a very specific someone, namely: folks like us. That is the intention behind it, a civic European "we", a Europe finally no longer dominated by Eurocrats and elites, a Europe no longer top-down, but bottom-up.

But who is that imagined bottom?

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There are enough atrocious human rights violations out there every day, many of them committed by or with the complicity of the European Union, at its external borders, in- and outside them. But their victims, significantly, are not mentioned at all in the text, nor are migrants, refugees, Roma, seasonal workers, prisoners, precariously employed people or any other vulnerable not-quite-demos human beings. “After all”, Schirach writes with almost disarmingly paternalistic candour, “it is our society, our world and our lives. And we are the ones who bear responsibility for those who are weaker than us.” This is perhaps not a conscious omission, but certainly not an accidental one either. After all, this is about the construction of a *bürgerlich* European demos. This is about folks like me. I, a well-fed old German white male with a gargantuan carbon footprint and a stack of nice, inexpensive made-in-Bangladesh shirts in my wardrobe, am “everyone” and presented with a right to a clean environment and a clean supply chain as if *my* human dignity were the first thing in need of protection here. So, with that I am supposed to walk into that cemetery in Paris and say: Lafayette, here I am? I’ll be lucky if he won’t rise from his grave and punch me in the face.

Rights entitle someone, and they oblige someone. They don’t come about by a bunch of Europeans liking a nicely written text with a QR code, but by someone fighting someone. There is no lack of fights for human rights all around, and each of the human rights formulated in Schirach’s text has a fight of that kind at its core, but in most of those I find myself, to stick to the Lafayette metaphor, in a distinctly aristocratic position: my consumption of resources, my power of discourse, my EU citizen passport, my use of social media and cheap online delivery services, my freedom from fear in contact with the police – wherever human rights are claimed, I am mostly at the opposite end. All this is made invisible in Schirach’s text, and I would guess that’s not just a mishap, but that is what this text is actually supposed to achieve: It’s a feel-good move for European smartphone users so that they can feel a bit less bad in the face of all the unspeakably awful things happening all over the place, and at the same time be spared the imposition of solidarity.

Don’t get me wrong: my problem with Schirach’s text is not that it’s utopian. On the contrary. Human rights are and always have been “concrete utopias” that, precisely because they are unrealisable, continually push the boundaries of what is perceived as possible. That is their strength, not their weakness. This can be learned from another newly released book these days, which, unlike Schirach’s booklet, I would unreservedly recommend for reading: Wolfgang Kaleck, author of the [volume published by S. Fischer](#), has decades of experience as a lawyer and founder of the European Council for Constitutional and Human Rights (ECCHR) in suing for and enforcing human rights in court and holds a special position of

honour in what is surely not only my personal hall of fame of human rights heroes. He counters the rampant human rights hangover of many with a vibrant decolonial, feminist, climate activist “concrete utopia” of human rights that works to “actually overturn the conditions in which man is enslaved by man”. Plenty of work to do there. And if, through the continuous work on this concrete utopia, the citizens and inhabitants of Europe or even larger spatial contexts one day merge into something that recognises itself as a demos, that, of course, is completely fine with me. But please, let old Lafayette rest in peace. (By the way, does anyone know where Olympe de Gouges is buried?)

The week on Verfassungsblog

First of all, I would like to draw your attention to a **call for papers**: As part of our BMBF-funded project “Open Access to Public Law” (OZOR), we want to collect essays and reports on how legal scholars experienced their access to publications and publication opportunities during the Corona crisis. Interested? Details [here](#).

Last week I took a break from editorial due to the holidays. Therefore, there are two weeks to report on, and a lot has happened in the meantime:

In **Poland**, independent judges who try to apply EU law and ECJ rulings are threatened with abusive criminal charges and coercive measures. [LAURENT PECH and PATRYK WACHOWIEC](#) address an open letter to the European Commission. The space is also getting narrower for opinions that displease the Polish government. [ALEKSANDRA GLISZCZY#SKA](#) reports on a court case brought against a Polish writer and a couple of high school students for allegedly insulting Polish President Andrzej Duda. Two history professors were found guilty of libel for publishing their research on Polish history, and [TOMASZ TADEUSZ KONCEWICZ](#) reflects on the importance of a robust historical discourse and the “mismemory” policy in Poland.

In **Hungary**, a newspaper columnist was taken to court because he called medieval Hungarian tribes “stinking migrants” and thus, in the view of Hungarian law, violated the “dignity of the Hungarian nation”. [PETRA BÁRD](#) analyses what the Supreme Court ruling means and what role the constitutional amendments of recent years play in it.

In **Slovenia**, many are wondering whether PM Jansa will become the next would-be autocrat at the helm of an EU member state. According to [SAMO BARDUTZKY, BOJAN BUGARIC and SASA ZAGORC](#), his actions are a case of “constitutional hardball”, i.e. the destructive game of exhausting all constitutional possibilities to make life difficult for the political opponent.

In **Croatia**, the fight about the election of the President of the Supreme Court threatens to damage the integrity of the constitutional order. [TIM HUYENG](#) reports.

In **Slovakia**, the government has fallen apart one year after its formation. For [MICHAL OVÁDEK](#), the origin of the political crisis is clear: Prime Minister Igor Matovič.

The 1921 **Turkish** Constitution celebrates its centenary this year. [CEM TECIMER](#) shows how the same document serves the arguments of both camps in the ‘culture war’ over Turkey’s future.

In **Spain**, politics and the party landscape are not coming to rest, especially at the regional level. In the run-up to Madrid’s regional election, [FRANCISCO JAVIER ROMERO CARO](#) explains the intricacies of Spain’s ongoing political drama.

In the **UK**, the role of the Queen, many believe, is purely ceremonial. But recent revelations show that the Queen has actively intervened in law-making, including to keep her family’s fortune under wraps. [THOMAS ADAMS](#) thinks that Parliament would do well to end this archaic practice.

In March, a court in **Scotland** struck down a Corona measure as an unreasonable restriction on religious freedom. [PABLO GREZ HIDALGO](#) warns that the proportionality test should be used carefully in pandemic times.

In **Italy**, COVID-19 vaccination will become compulsory for health workers. This interferes with the constitutionally protected right to health self-determination, but in a constitutional way, according to [MICHELE MASSA](#).

EU member states are unhappy with the EU’s distribution of **vaccines**. Yet much of the criticism is unjustified, writes [GARETH DAVIES](#). National governments should not blame their own failures on the EU.

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*All best,
the Verfassungsblog team*

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The **Conference of Minister Presidents** has become a symbol of German disunity and indecision in the Covid-19 crisis. There has always been a longing for centralised power concentration, but in times of crisis the voices get louder. In our crisis podcast, I discuss with [FRANCESCO PALERMO](#) how much truth there is behind the current criticism of federalism.

[GEORG HERMES](#) also looks at German **federalism** in the time of the pandemic. At present, the federal government is not sufficiently fulfilling its obligation to lay down the rules required to cope with the epidemic situation. [JOHANNES GALLON](#), on the other hand, believes that uniform federal regulation is not so easy to achieve without the cooperation of the state governments.

The Corona crisis has created a social **climate of fear** not seen since wartime. [MAURIZIO BACH](#) reflects on alternatives to “governing by fear”.

The German **state of epidemic crisis**, initially limited to 31 March 2021, will become permanent. [ANNA-LENA HOLLO](#) considers this a missed opportunity to deal with the constitutional problems of executive decision-making.

The “**functioning of the health system**” has become a blanket argument to permanently undermine civil liberties. [LINO MUNARETTO](#) thinks courts should set limits to this.

In non-corona-related news: The German federal government wants to create a legal basis in parliament to regulate the external appearance of civil servants. However, according to [KLAUS FERDINAND GÄRDITZ](#) and [MARYAM KAMIL ABDULSALAM](#), within the supposed “lex tattoo” there is hidden a sensitive restriction of religious freedom of federal and state civil servants – the basis for a **headscarf ban** that is highly questionable from a constitutional point of view.

This week, another plane with **Afghan deportees** has taken off from a German airport, without much public or political attention. According to [MATTHIAS LEHNERT](#), in view of the dangers, the supply situation and the living conditions in Afghanistan, there should really be only one imperative: an unconditional ban on deportations that applies to all those seeking protection. [VALENTIN FENEBERG](#) and [PAUL PETTERSSON](#) have examined one year of asylum case law on protection seekers from Afghanistan. They show that the courts perceive the living situation in the country very differently after the pandemic outbreak.

[BENEDIKT RIEDL](#) comments on the Federal Constitutional Court’s decision to stop the Federal President’s execution of the **Own Resources Ratification Act** (ERatG): The court has thus provisionally averted the danger of taking a path to fiscal union that might be unconstitutional and contrary to European law.

With the current State Media Treaty, the **German Press Council**, as an private organ of self-regulation, is getting public competition. This is constitutionally overdue, says [TORBEN KLAUSA](#).

In Russia, the data protection authority has targeted several **Telegram bots** that trade in personal data and deeply interfere with the privacy of third parties. [VALENTINA GOLUNOVA](#) shows that the Russian data protection authority is relatively powerless against developers. Banned bots are back online within hours and privacy breaches continue.

This year, the UN working groups on **international law in the digital space** will present their final reports. [RICHARD SCHMIDT](#) criticises that human rights and further limits to sovereignty hardly appear in the paper.

In the USA, several bills have been introduced to solve the antitrust problems with the **iOS App Store and the Google Play Store**. [DÉSIRÉE KLINGLER](#) shows why the “gatekeeper” role of big tech needs to be addressed and app stores democratised.

I found our online symposium on the topic of [constitutional expertise in the political sphere](#) to be a particular highlight of the last two weeks. This symposium was intended as a debate on the perceptible mutual irritations between legal scholarship and politics, and a debate of that sort it became, even though the irritations only flared up in part, for example in the contribution by the Parliamentary State Secretary in the Federal Ministry of the Interior [GÜNTER KRINGS](#) and in some of the reactions to it. So far, [OLIVER LEPSIUS](#), [ANNA-BETTINA KAISER](#) and [MATTHIAS JESTAEDT](#), [DANIEL THYM](#), [FRIEDHELM HASE](#), [UWE VOLKMANN](#), [ISABEL FEICHTNER](#), [THORSTEN KINGREEN](#) and [ALEXANDRA KEMMERER](#) have taken a stand on this issue from the legal community, [KONSTANTIN KUHLE](#) from politics alongside Krings, and [ANDREAS BUSCH](#) from political science and [ANDREAS M. SCHEU](#) and [DANIEL NÖLLEKE](#) from media studies. Highly recommended reading!

So much for this week. All the best to you, thank you and see you around!

Max Steinbeis

